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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ILENE CHRISTINE YBAVE, Appellant.	)	2 CA-CR 2011-0175 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102202

Honorable Richard S. Fields, Judge

AFFIRMED

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Attorneys for Appellee

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K E L L Y, Judge.

¶1 Ilene Ybave was convicted after a jury trial of second-degree murder and sentenced to a mitigated, thirteen-year prison term. On appeal, she argues her conviction must be reduced to manslaughter because the evidence "overwhelmingly supported a finding that she acted upon a sudden quarrel or heat of passion resulting from adequate provocation." She additionally contends the trial court fundamentally erred in instructing the jury that it should not consider whether Ybave committed manslaughter unless it first determined she had not committed second-degree murder, in omitting from the defense-of-a-third party instruction that the use of deadly physical force is justified "in response to apparent deadly physical force," and in failing to sua sponte instruct the jury on the crime prevention defense pursuant to A.R.S. § 13-411. We affirm.

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In June 2010, F. argued with Ybave's mother while both were at F.'s girlfriend's apartment. Ybave came to the apartment armed with a handgun. Upon seeing F. shove her mother, who slipped and fell to the floor, Ybave shot and killed F. Ybave claimed at trial that she had come to the apartment after hearing the argument and that F. had punched her mother, knocking her to the ground, and then rushed at her, and that she had shot him because she was afraid he was "going to do to [her] what he had d[one] to [her] mom." Ybave was charged with first-degree murder, but the jury found her guilty of the lesser-included offense of second-degree murder, and she was sentenced as described above. This appeal followed.

¶3 Ybave first asserts there was "overwhelming" evidence she had shot F. "upon a sudden quarrel or heat of passion resulting from adequate provocation" and that we therefore should reduce her second-degree murder conviction to manslaughter. On

appeal, "[w]e review the sufficiency of evidence presented at trial only to determine whether substantial evidence supports the jury's verdict." *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). "'Substantial evidence' is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). We will reverse Ybave's conviction of second-degree murder "only if 'there is a complete absence of probative facts to support [the jury's] conclusion'" that she had committed second-degree murder instead of manslaughter. *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶4 Pursuant to A.R.S. § 13-1103(A)(2), a person commits manslaughter by "[c]ommitting second degree murder as defined in [A.R.S.] § 13-1104, subsection A upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." Although we agree with Ybave that there was ample evidence from which the jury could conclude she had committed manslaughter, we disagree the evidence required that conclusion.[1] Viewing the evidence in the light most favorable to upholding the jury's verdict, *see Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d at 34, the jury reasonably could have determined that F. had pushed Ybave's mother, but that she had fallen only because she slipped on water on the kitchen floor from a leaking refrigerator. And, based on that finding, the jury could have concluded there had been no provocation adequate to "deprive a reasonable person of self-control." A.R.S. § 13-1101(4) (defining "adequate

[1]Ybave spends a significant portion of her brief asserting that the state bore the burden of proving the absence of a sudden quarrel or heat of passion resulting from adequate provocation. She does not suggest, however, that the jury was incorrectly instructed on the state's burden of proof, and we conclude the jury could have determined beyond a reasonable doubt that Ybave did not act upon adequate provocation.

provocation"). Absent such provocation, Ybave was at least guilty of second-degree murder. Although Ybave identifies conflicting evidence, most notably inconsistencies between testimony by F.'s girlfriend and her statements to police, it was the jury's role to resolve those conflicts, and we do not reweigh the evidence on appeal. *See Jones*, 125 Ariz. at 419, 610 P.2d at 53.

¶5 Ybave next asserts the trial court committed fundamental error "by instructing the jury not to consider the lesser included offense of manslaughter unless it first determined that [she] did not commit second degree murder." The jury was instructed it could "consider the lesser offense of manslaughter by sudden quarrel or heat of passion" if it found Ybave "not guilty of both first degree murder and second degree murder" or, "[a]fter full and careful consideration of the facts," it could not "agree on whether to find the defendant guilty or not guilty of first degree murder or second degree murder."

¶6 As Ybave recognizes, she did not object to this instruction below and we therefore review only for fundamental, prejudicial error. *See State v. Moody*, 208 Ariz. 424, ¶ 189, 94 P.3d 1119, 1161 (2004) (by failing to object to jury instruction, defendant waives all but fundamental error); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (by failing to object to error in trial court, defendant forfeits right to assert all but fundamental error and must establish error was prejudicial). Ybave argues that, if the jury followed the instruction to the letter, it would not reach the question whether she was guilty of manslaughter instead of second-degree murder.

¶7 We rejected an identical argument in *State v. Eddington*, 226 Ariz. 72, 244 P.3d 76 (App. 2010). Although we acknowledged the argument was "logically compelling," *id.* ¶ 31, we determined the instruction, even if erroneous, did not prejudice

the defendant because the jury was additionally instructed, pursuant to A.R.S. § 13-115(B), that, "[i]f you determine that the defendant is guilty of either second degree murder or manslaughter by sudden quarrel or heat of passion but you have a reasonable doubt as to which it was, you must find the defendant guilty of manslaughter by sudden quarrel or heat of passion." *Eddington*, 226 Ariz. 72, ¶ 32-33, 244 P.3d at 86. Thus, we reasoned, "[t]he lesser offense was . . . in jurors' minds when they rendered their verdict on second-degree murder, and they had been clearly instructed that adequate provocation would be a ground for finding Eddington not guilty of the offense of which he was convicted." *Id.* ¶ 32. The jury was identically instructed here.

¶8 Although Ybave contends *Eddington* was wrongly decided, her arguments are, at their core, nothing more than the same arguments we rejected in that case. We denied relief in *Eddington* because, "given the fundamental-error posture of this case," the defendant failed to demonstrate any resulting prejudice; the jury clearly was aware "that adequate provocation would be a ground for finding [him] not guilty" of second-degree murder. *Id.* ¶¶ 31-32. For the same reason, we deny relief here.

¶9 Ybave next argues the trial court erred by omitting from the jury instruction defining defense of a third party that Ybave was justified in using deadly force in response to the "apparent" use of deadly physical force by F. *See State v. Grannis*, 183 Ariz. 52, 61, 900 P.2d 1, 10 (1995) ("reasonably apparent deadly force" sufficient to justify deadly force in response), *disapproved on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010). Ybave did not raise this argument below and we again review only for fundamental, prejudicial error. *See Moody*, 208 Ariz. 424, ¶ 189, 94 P.3d at 1161; *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Even assuming the instruction given by the court was error, Ybave requested a jury instruction that is

materially identical to the instruction given. "[W]hen a party requests an erroneous instruction, any resulting error is invited and the party waives his right to challenge the instruction on appeal," even for fundamental error. *State v. Logan*, 200 Ariz. 564, ¶¶ 8-9, 30 P.3d 631, 632-33 (2001). Thus, we do not address this argument further.

¶10 Finally, Ybave contends the trial court erred in failing sua sponte to give an instruction on the crime-prevention justification pursuant to § 13-411. Because Ybave did not request the instruction below, we review this claim too for fundamental, prejudicial error. *See State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); *see also Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. A trial court's failure to instruct on vital matters may amount to fundamental, prejudicial error "'even if not requested by the defense.'" *State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003), *quoting State v. Avila*, 147 Ariz. 330, 337, 710 P.2d 440, 447 (1985). But, "[i]t is a rare case where the omission of an instruction without objection constitutes fundamental error." *State v. Marchesano*, 162 Ariz. 308, 316, 783 P.2d 247, 255 (App. 1989), *disapproved of on other grounds by State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002).

¶11 Ybave asserts that the crime-prevention defense "is broader in scope than other justification defenses" and that "deadly physical force can be [justified] to counter less than deadly force." But even assuming Ybave is correct, a crime-prevention instruction would not have meaningfully differed from the instructions given here. A defendant is not "entitled to [a particular] instruction when it is adequately covered by other instructions." *State v. Martinez*, 196 Ariz. 451, ¶ 36, 999 P.2d 795, 804 (2000). Section 13-411(A) provides: "A person is justified in . . . using . . . deadly physical force against another if and to the extent the person reasonably believes that . . . deadly

physical force is immediately necessary to prevent the other's commission of" certain enumerated crimes, including aggravated assault causing serious physical injury. *See* A.R.S. § 13-1204(A)(1). Any argument that Ybave's shooting F. was justified under either self-defense or crime-prevention would have been based on the same conduct—F.'s purported attempt to attack Ybave.

¶12 The trial court instructed the jury that "[a] defendant may use deadly physical force in self-defense only to protect against another's use or apparent attempted or threatened use of deadly physical force." Consistent with A.R.S. § 13-105(14), the court further defined "deadly physical force" as "[f]orce which is used with the purpose of causing death or serious physical injury[] or . . . [f]orce which in the manner of its use is capable of creating a substantial risk of causing death or serious physical injury." The only crimes listed in § 13-411(A) that Ybave could have been attempting to prevent—most likely aggravated assault pursuant to § 13-1204(A)(1)—necessarily included the use or attempted use of deadly physical force. Thus, the instructions given encompassed the crime-prevention justification.

¶13 We reject Ybave's contention that the presumption of reasonableness in § 13-411(C) is material here. That subsection states that "[a] person is presumed to be acting reasonably for the purposes of this section if the person is acting to prevent what the person reasonably believes is the imminent or actual commission of any of the offenses listed in subsection A of this section." § 13-411(C). Although the self-defense and defense-of-third-person statutes have no similar presumption, *see* A.R.S. §§ 13-403 through 13-406, the presumption in § 13-411(C) is rebuttable and therefore disappears when the state presents contradictory evidence. *See State v. Martinez*, 202 Ariz. 507, ¶¶ 18-19, 47 P.3d 1145, 1148-49 (App. 2002). The state presented ample evidence

contradicting any claim that Ybave had been engaged in crime-prevention when she shot and killed F. Thus, even assuming Ybave was entitled to a jury instruction on the presumption in § 13-411(C), she has not demonstrated any prejudice resulting from its absence. *See Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609.

¶14 For the reasons stated, Ybave's conviction and sentence are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge